FILE COPY



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1947.

No. 466

PARFAIT POWDER PUFF COMPANY, INC.,
*Petitioner,*

*vs.*

THE UNITED STATES OF AMERICA,
*Respondent.*

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.**

JOSEPH ROSENBAUM,
*Counsel for Petitioner.*

HARRY H. RUSKIN,
*Of Counsel.*

THE BUNTHORP-WARREN PRINTING COMPANY, 210 WEST JACKSON, CHICAGO

## INDEX.

## Cases Cited.



## Texts Cited.



## Statutes Cited.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1947.

---

**No.** .....

---

PARFAIT POWDER PUFF COMPANY, INC.,
*Petitioner,*

*vs.*

THE UNITED STATES OF AMERICA,
*Respondent.*

---

## PETITION FOR WRIT OF CERTIORARI.

---

MAY IT PLEASE THE COURT:

The petition of Parfait Powder Puff Company, Inc., an Illinois corporation, respectfully shows to this honorable court:

## SUMMARY STATEMENT OF THE MATTER INVOLVED.

---

Neither the opinion of the circuit court of appeals nor that of the district court has been reported. They appear in the record respectively at pages 117-121, and 94-96.

Petitioner was convicted and fined on a criminal information (R. 2, Tr. 3) for its alleged violation of section 301 (a) of the Federal Food, Drug and Cosmetics Act (Act of June 25, 1938, 52 Stat. 1042, ch. 675; 21 U. S. C. sec. 331a) by unlawfully *introducing* and *delivering for introduction* (*not* causing such acts) into interstate commerce on seven occasions between August 3 and August 9, 1943, cosmetics which were adulterated in that they contained a

deleterious substance rendering it injurious to users under the conditions of use prescribed on the label.

A trial was had to the court without a jury (R. 10, Tr. 17) on a plea of not guilty (R. 9, Tr. 15). The court found the defendant guilty (R. 102, Tr. 207-8), overruled motions for acquittal at the close of the government's case (R. 55, Tr. 99) and for a new trial (R. 104, Tr. 213), and entered a judgment of guilty with a fine (R. 102, Tr. 207-8), which the circuit court of appeals affirmed (R. 122).

Petitioner's plant and offices were located at 1500 North Ogden Avenue, Chicago, Illinois, where it had leased 33,000 feet of space and had from 70 to 200 employees depending upon the season (R. 71, Tr. 128). Helfrich Laboratories, Inc., since 1920 or 1921 (R. 26, Tr. 47), was a private label manufacturer of cosmetics and semi-pharmaceutical products with its plant and offices on the fourth floor (R. 42, Tr. 75-6) of the premises at 564 West Monroe Street, Chicago, Illinois, selling nothing under its own label, and selling only to people who in turn distributed the merchandise which it usually manufactured (R. 17; Tr. 32).

In May 1943, petitioner was desirous of selling and distributing at wholesale a hair lacquer pad under its own trade name, "Locks-Up", and contacted Helfrich Laboratories, Inc., who submitted a sample hair lacquer which petitioner tested on its own employees and found satisfactory (R. 57, 58, Tr. 103-5).

Petitioner then entered into an oral contract with Helfrich whereby petitioner would supply Helfrich with flannel pads, jars, caps, labels, display cards and shipping containers, and Helfrich would, for a price of eight cents (8¢) per jar, impregnate the pads with lacquer as per sample, place them in jars with petitioner's labels thereon, and ship them directly to petitioner's customers, retailers in various states (R. 58-9, Tr. 105-7). The finished product sold for 20¢ per jar, so that Helfrich's charge represented 40%

of the finished cost. The lacquer represented about 80% of the weight of the finished product (R. 60, Tr. 107) and was purchased by Helfrich Laboratories alone from its own selected source of supply, Orchid Laboratories, then unknown to petitioner (R. 84, 78, 29; Tr. 150-1, 140, 53).

Petitioner would send Helfrich, by mail or personal delivery, duplicate typewritten copies bearing the same serial numbers, one with a number 4 and blue border and the other with a number 5 and orange border, which stated the name of petitioner's customer, the out-of-state destination and the quantities of the product to be shipped (R. 43, 60-1, Tr. 108-9). They were received by Helfrich about the date they bear and were all (with the exception of the rush shipment to Schuster in Milwaukee, Wisconsin) dated four weeks or more prior to their delivery by Helfrich to the common carriers (R. 112). In the interim they would be kept in date boxes by Helfrich's employees in Helfrich's shipping department as a record of orders they were to ship (R. 45, Tr. 80). These were the orders and "shipping directions" referred to as having been given by petitioner (R. 43, Tr. 77).

Helfrich Laboratories, Inc., itself purchased (R. 84, Tr. 150) and made up the lacquer, impregnated the pads, put them up in jars and packed them in the shipping containers in its own factory with its own employees (R. 43, Tr. 77-8). Helfrich's own paid employees filled out the shipping documents (which named petitioner as consignor) consigned to petitioner's customers in other states, and directly delivered the merchandise and documents to common carriers of Helfrich's employees' selection, all on Helfrich's own premises (R. 42-5, Tr. 75-81).

*After* its employees had shipped the merchandise to petitioner's customers, Helfrich invoiced the petitioner for its price, attaching to its invoices the orange bordered copy above referred to, on which its shipping employees rubber

stamped a form and inserted the information of the shipment. That was the first information petitioner had of the shipments made (R. 61-3, 43-4, Tr. 109-113, 78-9).

With respect to *all* the shipments in question, Helfrich Laboratories, Inc., without petitioner's knowledge or consent (R. 84, 67, Tr. 151, 120-1), substituted a gum (R. 84, Tr. 150) for the shellac it had been using in making the approved hair lacquer, and the resultant product, which it by its own employees delivered to the common carriers on its premises, was adulterated and was not as per sample (R. 66). The formula of the approved sample was Helfrich's and was unknown to petitioner (R. 66, T. 119).

The substitution was discovered by petitioner about two weeks later, and immediately ordered stopped, although not until at least a month later (R. 67, Tr. 119) was it learned that the product was injurious. Petitioner on October 8, 1943, sent a telegram (R. 98, Tr. 193) to all customers for the return of the products shipped during the two week period in which the substitution had been made. After discovering the substitution, petitioner purchased no more hair lacquer from Helfrich (R. 69, 29; Tr. 124-5, 53).

Petitioner furnished the Food and Drug Administration on request all documents and copies pertaining to the product and its delivery and Helfrich's name and address (R. 69, Tr. 123-4).

## JURISDICTIONAL STATEMENT.

Jurisdiction is conferred by section 240(a) of the Judicial Code as amended by Act of February 13, 1925 (28 U. S. C., sec. 347a); and this petition is filed within 30 days after November 4, 1947, the date of the entry of the judgment of the circuit court of appeals for the seventh circuit (R. 122), as required by Rule 37(b)(2) of the Federal Rules of Criminal Procedure.

## QUESTIONS PRESENTED.

1. Can one be criminally liable for a Federal crime committed by another whom he has not aided, abetted, counseled, commanded, induced or procured to commit it, with whom he has not conspired to commit it, with whom he does not stand in any relationship of master and servant, fellow servant, principal and agent, partnership or conspiracy, and with whom he has only entered into a lawful contract in undertaking to perform which the criminal actor, without his knowledge or consent, has done an act which is in breach of the contract as well as in violation of the law, and which is promptly repudiated on its discovery?

2. Is a wholesale distributor of a cosmetic bearing his label a criminal violator of section 301(a) of the Federal Food, Drug and Cosmetic Act, where the manufacturer (long engaged in an independent calling as a private brand manufacturer), in undertaking performance of its contract with the distributor to put up and ship to the distributor's out-of-state customers a cosmetic product as per tested and approved sample, has, without the distributor's knowledge or consent and in breach of the contract, substituted a deleterious ingredient and made an adulterated cosmetic and itself delivered the adulterated cosmetic on its own premises by its own employees directly to the common carrier for interstate shipment to the distributor's customers, and prepared for and received from the carrier shipping documents naming the distributor as consignor?

3. If so, does not said act violate the Due Process Clause of the Fifth Amendment to the Constitution of the United States?

4. Does section 303(c)(1) of the Food, Drug and Cos-

metic Act relieve from the penalties of the Act a wholesale cosmetic distributor who has acted in good faith and made requisite full disclosure to the Food and Drug Administration, where, in undertaking performance of its contract with the distributor to put up and ship to distributor's out-of-state customers a cosmetic product as per tested and approved sample, the manufacturer (who has without the distributor's knowledge or consent and in breach of the contract substituted a deleterious ingredient and made an adulterated cosmetic bearing the distributor's label) himself delivered the adulterated cosmetic on his own premises by his own employees directly to the common carrier for interstate shipment to the distributor's customers and prepared for and received from, the carrier shipping documents naming the distributor as the consignor?

## REASONS RELIED ON FOR ALLOWANCE OF WRIT.

1. The circuit court of appeals has decided important questions of federal law which have not been, but should be, settled by this court: First, the extent of the imputation of criminal responsibility for another's crime under the Federal Food, Drug and Cosmetics Act, and generally under criminal acts dispensing with scienter; and Second, the scope of the exemption of section 303(c)(1) of the act with respect to distributors acting in good faith and innocently purchasing cosmetics from manufacturers who, by unauthorized and undisclosed substitution, make and ship adulterated cosmetics in interstate commerce directly to distributors' customers.

2. The decision of the circuit court of appeals is in conflict with the decision on the same matter of the circuit court of appeals for the eighth circuit in *Hall-Baker Grain*

*Co.* v. *U. S.*, 198 Fed. 614, involving section 2 of the Pure Food and Drugs Act of 1906 (34 Stat. 768, ch. 3915, Act of June 30, 1906) of which section 301(a) of the Federal Food, Drug and Cosmetic Act is a substantial reenactment.

## PRAYER.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this honorable court directed to the United States circuit court of appeals for the seventh circuit, commanding that court to certify and to send to this court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 9269, *The United States of America, plaintiff-appellee,* v. *Parfait Powder Puff Company, Inc., defendant-appellant,* and that the said judgment of the United States circuit court of appeals for the seventh circuit may be reversed by this honorable court, and that your petitioner may have such other and further relief in the premises as to this honorable court may seem meet and just; and your petitioner will ever pray.

PARFAIT POWDER PUFF COMPANY, INC.,
By JOSEPH ROSENBAUM,
*Counsel for Petitioner.*

HARRY H. RUSKIN,
*Of Counsel.*

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1947.

No. .....

PARFAIT POWDER PUFF COMPANY, INC.,
*Petitioner,*

*vs.*

THE UNITED STATES OF AMERICA,
*Respondent.*

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

### THE OPINION OF THE COURT BELOW.

The opinions of the courts below were not reported, but are in the record: that of the circuit court of appeals at pages 117-121, and that of the district court at pages 94-96.

### STATEMENT OF THE CASE.

The material facts with reference to the origin and history of the case, jurisdiction and the issues and questions presented have been stated in the preceding petition.

## SPECIFICATION OF ERRORS TO BE URGED.

The circuit court of appeals erred in affirming the judgment of the district court.

The circuit court erred in not reversing the judgment of the district court.

## ARGUMENT.

### I.

The circuit court of appeals has decided important questions of federal law which have not been, but should be, settled by this court.

**First**, there is the matter of the imputation of criminal responsibility for another's crime. The question has two aspects, both of vital importance, one affecting the administration of the Federal Pure Food, Drug and Cosmetic Act, the other affecting federal crimes generally, where *scienter* or *mens rea* are dispensed with.

The crime with which petitioner was charged was that of "introducing or delivering for introduction" into interstate commerce an adulterated cosmetic in violation of section 301(a) of the act. The act does not by its terms penalize a seller or purchaser for having made, or contracted to make, a sale or purchase, but prohibits only specifically described acts.

Helfrich Laboratories, Inc., (and its responsible officers) on the facts established in this record (by testimony of its own vice president and employees), was itself guilty of a

violation of the act. So holding is *Barnes* v. *United States*, (C. C. A. 9) 142 F. (2d) 648, and see *Arner* v. *United States* (C. C. A. 1), 142 F. (2d) 730, and *U. S.* v. *Buffalo Cold Storage Co.*, 179 Fed. 865. It was the manufacturer directly delivering to the common carrier for interstate shipment the very adulterated product it made.

Petitioner's criminal liability, if any, was necessarily only an imputed one, imputing to it the criminal act of Helfrich.

Since the contract between them was a lawful one and the substitution of the deleterious ingredient by Helfrich without petitioner's knowledge, there could have been no conspiracy and also no criminal liability under section 332 of the Criminal Code (18 U. S. C. sec. 550) as a principal, defined as one who "*directly* commits any act constituting an offense * * * or aids, abets, counsels, commands, induces or procures its commission."

The imputation is sought to be imposed by an extension of the doctrine of *United States* v. *Balint*, 258 U. S. 250, dispensing with *scienter* for certain classes of crimes, and *New York Central and Hudson River Railroad Company* v. *United States*, 212 U. S. 481, and *United States* v. *Dotterweich*, 320 U. S. 277, the former imputing liability to a corporate *principal* for the criminal acts of its officers and agents done in the ordinary course of the principal's business, the latter to a corporate officer for the criminal acts of *fellow-servants* under his established responsible supervision.

Going now beyond them, the circuit court of appeals has imposed an altogether new basis (for which it cites no precedent of this court and only cases of master and servant, R. 120) for imputing criminal liability to one other than the actor,—a doctrine of "instrumentality" and availing "of the acts of that instrumentality," without

requiring such instrumentality to be an agent, fellow-servant, partner or co-conspirator. The circuit court of appeals expressly disavowed the necessity for considering whether or not Helfrich was petitioner's agent. It was not petitioner's agent. Restatement of the Law of Agency, sections 2(3) and 220(2), *Casement* v. *Brown*, 148 U. S. 615.

It is the absence of an agency in this cause which obliged the court below to establish and resort to this doctrine of instrumentality.

Gone, now, are all personal liberty safeguards requiring aider, abetter, conspiracy, or representative status for the imputation of criminal liability for criminal acts of others. Now a lawful and innocent contract, prudently entered into in the ordinary course of business, *without more*, will impose criminal liability for the criminal act of the other party in breach of it, for every contract is an instrumentality for the accomplishment of the lawful objectives of the contracting parties.

Every innocent purchaser of cosmetics would become a criminal because a seller thereof has violated both contract and law by delivering adulterated products to a carrier, for every seller is an instrumentality by which a buyer procures an article or its manufacture for interstate shipment to him, and vice versa. Also, is it not more proper to say that petitioner was the innocent instrumentality whereby Helfrich committed its crime? Petitioner solicited its out-of-state customers for the sale of a tested and approved wholesome product. Helfrich used the medium of petitioner's sales to introduce into interstate commerce the adulterated product it manufactured and delivered to the carrier. Compare, *State* v. *Faulkner*, 175 N. C. 787, and *People* v. *Morse*, 131 Mich. 68.

In the *Dotterweich* case this court expressly condemned literalism in interpretation and limited imputed liability

only to those corporate officers or employees who "responsibly contribute" or have a "responsible share" in *furthering* the illegal transaction, or stood in a "responsible relation" (see pages 284, 285). The minority urged "it is a fundamental principle of Anglo-Saxon jurisprudence that guilt is personal and that it ought not lightly to be imputed to a citizen who * * * has no evil intention or consciousness of wrongdoing." Also, that "in the absence of clear statutory authorization it is inconsistent with established canons of criminal law to rest liability on an act in which the accused did not participate and of which he had no personal knowledge."

The doctrine established by the court below has not been settled by this court. It presents a perilous challenge to freedom of lawful contract, imposes obligations to be performed on another's premises beyond one's control and where his entry can be a trespass, and pledges one's personal liberty as forfeit for a stranger's crime (a high price) as an element of a lawful and innocent contract involving a distributor's purchase of foods and drugs, as well as cosmetics, from manufacturers for resales thereof, in sales made by the distributor in advance.

While the enforcement and administration of the Federal Food, Drug and Cosmetics Act is vitally affected, the principle is of more far reaching consequence, and is applicable to all federal crimes where *scienter* or *mens rea* are dispensed with.

It is a basic question worthy of, and requiring, determination by this honorable court.

**Secondly**, there is the question of the interpretation of the exemption newly granted in section 303(c)(1) of this act to persons who in good faith receive adulterated products in interstate commerce and proffer or make delivery of such articles to others. It is in addition to the

guaranty exemption of the 1906 act, reenacted in section 303(c)(2). Section 303(c)(1) has not been judicially interpreted before, and this case is one of first impression.

The court below determined that, so far as the purpose of the section was concerned, petitioner "has not received in interstate commerce the article complained of" (R. 120). That being the case, not even the guaranty exemption would avail petitioner, as it also applies only to one who has "received" the article (although not limited to receipt in interstate commerce), with the consequence that a common business practice of "drop shipments" (by the manufacturer directly to the distributor's customer) is outlawed. Form is made to govern substance. Because the manufacturer delivered directly to the common carrier for delivery to the distributor's customer out of state, the distributor has never *received* the article in interstate commerce. Actual physical receipt is made the criterion of the exemption from the penalties of the act.

Under the principle of *Federal Trade Commission* v. *Pacific States Paper Trade Association*, 273 U. S. 52, 64, it is beyond debate that Helfrich was engaged in interstate commerce; and, if the circuit court's conclusion is based on the contrary (it has not so stated), its decision is contrary to the cited case. Helfrich bought the raw material, made the product, delivered it to the interstate carrier and charged petitioner a price as agreed. Absent any agency (which the court below does not find), petitioner is as much a purchaser of the product as is its own customer.

While petitioner did not receive the article physically, it received it constructively at some time in the course of Helfrich's performance of its interstate commerce contract, certainly not before the time when it would be obligated by its contract to pay Helfrich the price,—which time was when the goods had been shipped by Helfrich.

Its receipt was as effective as if it had received shipping documents consigned to itself which it reconsigned while the shipment was enroute. Substance, not form, should govern.

If for lack of physical receipt, neither this exemption nor the guaranty can avail petitioner and others seeking to do business on the same basis, the method of business is outlawed. The *new* exemption contained in section 303(c)(1) requires interpretation; and an important method of doing business should not be obliged to be nationally discontinued by the interpretation of a statute without the question having been settled by this honorable court.

## II.

The decision of the court below is in conflict on the same matter with *Hall-Baker Grain Co.* v. *United States,* (C. C. A. 8) 198 Fed. 614, where a vendor of grain was held not criminally responsible under the 1906 act for misbranding by reason of the delivery by a warehouseman to the carrier for interstate shipment of an improper grade because of an error in grading by a state inspector. It was said that the act did not punish merchants conducting business in ordinary and approved methods "for the *mistakes of third persons over whom they have no control* nor for trivial errors of their own, which at first blush may seem to bring their action within the inhibition of the law, but which in reality they violate neither its letter nor its spirit." The case has never been disapproved.

Since section 301(a) is a substantial reenactment of section 2 of the 1906 act (which forbade anyone to "ship or deliver for shipment" an adulterated product in interstate commerce), it would ordinarily receive the same construction under the familiar rule that reenactments carry

with them the prior judicial interpretation of the statute reenacted.

Hence there is a conflict to be resolved by this honorable court.

## CONCLUSION.

It is respectfully submitted that the questions involved in this case,—applying as they do to the large nationwide industries, foods and drugs as well as cosmetics,—have not been settled by this honorable court. The outlawry of an established method of business distribution common to all these industries is effectively accomplished by the decision of the court below, both by its interpretation of section 301(a) imputing criminal liability thereunder to the distributor and the denial of the exemption of section 303(c)(1) to the distributor, for now, to assure that the other contracting party will not commit a crime, one is also required to pledge his own personal liberty as an element of an innocent and lawful contract alone without regard to previous concepts of criminal participation or fiduciary status.

We believe that the principles involved are of such importance that a review would justifiably be undertaken by this honorable court in the public interest and urge that the writ of certiorari be granted.

Respectfully submitted,

JOSEPH ROSENBAUM,
*Counsel for Petitioner.*

HARRY H. RUSKIN,
*Of Counsel.*

## APPENDIX.

Section 301(a) and (c) of the Federal Food, Drug and Cosmetic Act, Act of June 25, 1938, ch. 675, 52 Stat. 1042, 21 U. S. C. sec. 331(a) and (c), so far as material, provide as follows:

> "Sec. 301. The following acts and the causing thereof are hereby prohibited:
>
> (a) The introduction or delivery for introduction into interstate commerce of any * * * cosmetic that is adulterated or misbranded.
>
> (c) The receipt in interstate commerce of any * * * cosmetic that is adulterated or misbranded, and the delivery or proffered delivery thereof for pay or otherwise."

Section 303(a) and (c), 21 U. S. C., Section 333 (a) and (c), so far as material, provide as follows:

> Sec. 303. (a) Any person who violates any of the provisions of Section 301 shall be guilty of a misdemeanor and shall on conviction thereof be subject to * * * a fine * * *.
>
> (c) No person shall be subject to the penalties of subsection (a) of this section (1) for having received in interstate commerce any article and delivered it or proffered delivery of it, if such delivery or proffer was made in good faith, unless he refuses to furnish on request of an officer or employee only designated by the Administrator the name and address of the person from whom he purchased or received such article and copies of all documents, if any there be, pertaining to the delivery of the article to him; or (2) for having violated Section 301(a) * * *, if he establishes a guaranty * * * [of the person] from whom he received in good faith the article * * * that such article is not adulterated * * *;"

# INDEX



## CITATIONS





771405—47——1

# In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 466

PARFAIT POWDER PUFF COMPANY, INC., PETITIONER

*v.*

THE UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the circuit court of appeals (R. 117–121) and the opinion of the district court (R. 94–96) have not been reported.

### JURISDICTION

The judgment of the circuit court of appeals was entered November 4, 1947 (R. 122). The petition for a writ of certiorari was filed December 4, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

## QUESTIONS PRESENTED

1. Is there sufficient evidence to support the conclusion of the courts below that petitioner introduced into interstate commerce the adulterated cosmetics?

2. Whether petitioner is excepted from the penal provisions of Section 303 (a) as one who received the adulterated cosmetic in interstate commerce, within the meaning of Section 303 (c).

## STATUTE INVOLVED

The Federal Food, Drug, and Cosmetic Act of June 25, 1938, c. 675, 52 Stat. 1040, provides in pertinent part:

> SEC. 201 [21 U. S. C. 321]. For the purposes of this Act—
>
> * * * * *
>
> (e) The term "person" includes individual, partnership, corporation, and association.
>
> * * * * *
>
> SEC. 301 [21 U. S. C. 331]. The following acts and the causing thereof are hereby prohibited:
>
> (a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded.
>
> * * * * *
>
> (c) The receipt in interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded, and the delivery or proffered delivery thereof for pay or otherwise.
>
> * * * * *

SEC. 303 [21 U. S. C. 333]. (a) Any person who violates any of the provisions of section 301 shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than $1,000, or both such imprisonment and fine; * * *.

* * * * *

(c) No person shall be subject to the penalties of subsection (a) of this section, (1) for having received in interstate commerce any article and delivered it or proffered delivery of it, if such delivery or proffer was made in good faith, unless he refuses to furnish on request of an officer or employee duly designated by the Administrator the name and address of the person from whom he purchased or received such article and copies of all documents, if any there be, pertaining to the delivery of the article to him; * * *.

* * * * *

SEC. 601 [21 U. S. C. 361]. A cosmetic shall be deemed to be adulterated—

(a) If it bears or contains any poisonous or deleterious substance which may render it injurious to users under the conditions of use prescribed in the labeling thereof, or under such conditions of use as are customary or usual: * * *.

**STATEMENT**

On June 13, 1945, an information in 7 counts was filed against petitioner in the United States

District Court for the Northern District of Illinois, each count of which charged that at a specified time petitioner unlawfully introduced into interstate commerce a shipment of adulterated cosmetics in that it contained a poisonous and deleterious substance, in violation of Section 301 (a) of the Federal Food, Drug, and Cosmetic Act (R. 2–9).

After trial by the district court without a jury, petitioner was found guilty and was fined $100 (R. 96). Upon appeal to the circuit court of appeals, the judgment was affirmed (R. 122).

Most of the facts are not in dispute. By stipulation (R. 11–14) between the parties, it was agreed (1) that the cosmetics involved in this case (hair lacquer pads) were adulterated as charged in that they contained a deleterious substance which might render them injurious to users under the conditions of use prescribed on their labels, and (2) that these cosmetics had been shipped interstate. The only question presented to the courts below was whether petitioner had introduced these adulterated cosmetics, or delivered them for introduction, into interstate commerce in violation of Section 301 (a), and if so, whether it was exempt from punishment by reason of the provisions of Section 303 (c) (1).

The petitioner is a corporation engaged in the manufacture and sale of cosmetic products. In May of 1943, petitioner, through its president, entered into an arrangement with Helfrich Labo-

ratories for the manufacture, packaging, and distribution of hair lacquer pads. (R. 58–59.) Helfrich Laboratories is a manufacturer of cosmetics and semi-pharmaceutical products, but sells nothing under its own label (R. 17). Under the arrangement (1) petitioner undertook to supply Helfrich Laboratories with jars, caps, labels, display cards, flannel pads, and shipping containers; (2) Helfrich Laboratories agreed to impregnate the flannel pads with a shellac hair lacquer, and to package and label the pads with petitioner's labels bearing its name and address; and (3) Helfrich Laboratories undertook to ship the finished product to petitioner's customers, pursuant to shipping instructions and bills-of-lading supplied by it. The bills-of-lading bore petitioner's name and address as consignor. (R. 19–20, 22, 58–59, 78.) The finished product sometimes was shipped out on the day it was packaged, or sometimes the next day, in which case it would go to the stockroom of Helfrich Laboratories awaiting shipping orders from petitioner (R. 25). Petitioner reserved, and through its general sales manager frequently exercised, the right to appear in the shipping room of Helfrich Laboratories and direct that certain orders be given priority over others and shipped immediately (R. 49, 52, 75).

The cosmetic in question was named "Locks-Up", a name selected by the petitioner's president (R. 59.) Helfrich Laboratories never

shipped any package of Locks-Up without first having received a shipping order from petitioner (R. 23, 74.) Following shipment to consignees designated by petitioner, Helfrich Laboratories billed the petitioner at 8¢ a jar for the amounts shipped (R. 63, 97). Petitioner, not Helfrich Laboratories, invoiced its customers at about 20¢ a jar for the products which Helfrich Laboratories had shipped to them at petitioner's request (R. 59, 60–61.) When Helfrich Laboratories shipped Locks-Up c. o. d., petitioner received the collection money (R. 75.)

The adulterated character of the shipments upon which the information was based resulted from a substitution by Helfrich Laboratories of a gum lacquer for a shellac lacquer, apparently without petitioner's knowledge (R. 30, 68, 82.)

## ARGUMENT

The questions before this Court are (1) whether, in view of the fact that Helfrich did the actual shipping of the product, there is sufficient evidence to support the conclusion of the courts below that petitioner introduced the adulterated cosmetics into interstate commerce, and (2) whether Section 303 (c) (1) of the Act exempts petitioner from the penalties provided by Section 303 (a). We submit that the courts below were clearly correct in answering the first question in the affirmative and the second in the negative.

## I

It is well-settled that statutes imposing criminal liability for acts which may be dangerous to the public, even when committed without intent to harm, have as their aim the inculcation of an attitude of vigilant care on the part of those responsible for the operation of the enterprise involved. *United States* v. *Balint et al.*, 258 U. S. 250, 254; *New York Central & Hudson River Railroad Company* v. *United States*, 212 U. S. 481, 495. This Court pointed out specifically in *United States* v. *Dotterweich*, 320 U. S. 277, 281, that section 201 (e) of the Federal Food, Drug, and Cosmetic Act defines "person" to include "corporation", and that this definition is sufficient to hold corporations criminally liable under the statute for the acts of their agents.

We submit that under the facts present in this case, it can by no means be stated, as declared by petitioner (Pet. 12), that the doctrine established by the circuit court of appeals "pledges one's personal liberty as forfeit for a stranger's crime" or "presents a perilous challenge to freedom of lawful contract." Helfrich Laboratories was not a "stranger" to petitioner, and it is clear that petitioner conducted an interstate business in the sale of Locks-Up through the medium of Helfrich Laboratories. It sought and obtained orders for the product from outside the State of Illinois, and

771405—47——2

filled them by directing Helfrich Laboratories, with which it had both a manufacturing and shipping arrangement, to ship specified quantities to designated customers.

In the Statement, *supra,* pp. 4–6, we have set forth the details of the relationship between petitioner and Helfrich Laboratories. It seems clear that this relationship was one of principal and agent. In *manufacturing* Locks-Up for petitioner, Helfrich Laboratories may well have been acting as an independent contractor. But in *shipping* Locks-Up at the petitioner's order, Helfrich Laboratories was wholly subject to its direction and control. Shipments were made in the name of petitioner and only pursuant to its express wishes. In legal as well as practical contemplation, in each instance it was the shipper through the agency of Helfrich Laboratories. Insofar as the shipment of Locks-Up was concerned, the relationship between the parties, as revealed in the Statement, *supra,* clearly falls within the definition of agency appearing in the Restatement of the Law of Agency, § 1, pp. 7–8.

Petitioner contends that while it authorized the interstate shipment of pads dipped in shellac lacquer, it did not authorize the interstate shipment of pads dipped in gum lacquer. Even the exercise of the highest degree of care, however, will not absolve a corporation from liability under a statute such as is here involved. See *United States* v. *Dotterweich,* 320 U. S. 277. What the

petitioner is really claiming is that it had no intent to violate the law. But intent is not an element of the offenses for which penalties are provided by Section 303 (a) of the Act. *United States* v. *Greenbaum,* 138 F. (2d) 437 (C. C. A. 3), 152 A. L. R. 751.

The facts portray a situation where petitioner took lightly its responsibility to the public to furnish cosmetics that would not be injurious. Although, at the outset of its relationship with Helfrich Laboratories, petitioner had tested a sample and found it to be satisfactory, it failed thereafter to exercise any control whatever over the ingredients of the lacquer and seemed to know or care little with respect to the kind of lacquer being used. It is to be noted, in this connection, that a small percentage of the output of the product was obtained by petitioner from Helfrich Laboratories as samples (R. 23–24), and these could have been tested by it to determine the potentiality of the product for harm. The circuit court of appeals properly held that a passive reliance, such as petitioner's, upon tests which might or might not be given by the instrument chosen by it to introduce a product into interstate commerce, and over which it exercised the degree of control indicated above, does not meet the public policy which requires the highest degree of care from those who cause the introduction into interstate commerce of food, drugs, and cosmetics, whether or not the motivating force behind the transaction can be

labeled as a "principal." It would appear that the controls which an interstate dealer is required to maintain over those acting on his behalf are continuing; and that the fact that a sample examined at the outset of a business relationship is found to be satisfactory is not sufficient forever to absolve such a dealer from liability for subsequent illegal shipments made on his behalf. It would not seem to be stepping beyond the confines of the Federal Food, Drug, and Cosmetic Act, and the reasons for its enactment, to require a concern which is having food, drugs, or cosmetics distributed under its name in interstate commerce to take affirmative precautions to see to it that the product will not be injurious to the public health. Thus, the circuit court of appeals pointed out (R. 118):

> It is clear that defendant was engaged in procuring the manufacture and distribution of the article in interstate commerce. It saw fit to create out of Helfrich's activities in its behalf an instrumentality and to avail itself of the acts of that instrumentality, which effected an introduction into commerce of an adulterated article violative of the standards fixed by the Act. * * * The liability was not incurred because defendant consciously participated in the wrongful act, but because the instrumentality which it employed, acting within the powers which the parties had mutually agreed should be lodged in it, violated the law.

The rationale for holding liable one who has a responsible share in causing the introduction into interstate commerce of a contraband drug product, and relied on by the circuit court of appeals, was enunciated by this Court in *United States* v. *Dotterweich,* 320 U. S. 277, 280–281, 284–285, where it was stated:

> The prosecution to which Dotterweich was subjected is based on a now familiar type of legislation whereby penalties serve as effective means of regulation. Such legislation dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger. * * *
>
> * * * * * * * * Whether an accused shares responsibility in the business process resulting in unlawful distribution depends on the evidence produced at the trial and its submission—assuming the evidence warrants it—to the jury under appropriate guidance. The offense is committed, unless the enterprise which they are serving enjoys the immunity of a guaranty, by all who do have such a responsible share in the furtherance of the transaction which the statute outlaws, namely, to put into the stream of interstate commerce adulterated or misbranded drugs. Hardship there doubtless may be

> under a statute which thus penalizes the transaction though consciousness of wrongdoing be totally wanting. Balancing relative hardships, Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless.

*Hall-Baker Grain Co.* v. *United States,* 198 Fed. 614 (C. C. A. 8), relied upon by petitioner (Pet. 14), is not opposed either in result or reasoning to the instant case. The facts of that case reveal that the defendant, the Hall-Baker Grain Company, was dealing with a public grain elevator capable of containing 1,000,000 bushels of wheat. All wheat received by the elevator, including that of the defendant, was classified as to grade by an official State Inspector, and commingled in bins according to grade. When an owner of a portion of such wheat ordered the shipment of a certain quantity of a particular grade, the elevator company loaded wheat out of the bin containing such grade. This wheat was then inspected by an official State Inspector who certified it to be of a certain grade. The defendant's contract of sale provided that it was selling a certain grade of wheat classified according to State inspection. The defendant directed the grain company to ship the type of wheat covered

by the contract of sale with the purchaser, and the requisite State inspection was had, but an inspection at destination point revealed that the wheat contained a portion of an inferior grade. The United States Circuit Court of Appeals for the Eighth Circuit, in reversing the conviction of the Hall-Baker Grain Company for shipping in interstate commerce adulterated and misbranded wheat, pointed out that merchants should not be held responsible for the mistakes of third persons "over whom they have no control" (198 Fed. at page 618). It can be readily seen that the control which the defendant in the *Hall-Baker* case exercised over the interstate shipment of the grain was far less than the control exercised by petitioner in the instant case.

In the present case, moreover, petitioner's pads never lost their identity. After being treated with lacquer by the Helfrich Laboratories, they were put in jars supplied by petitioner, and labeled and packaged with materials furnished by it. They were then placed in the stockroom of Helfrich Laboratories, or sent direct to the latter's shipping room as the separate property of the petitioner. Helfrich Laboratories, it will be noted, performed a processing, packaging, and distribution service with respect to materials of which all but one, the lacquer, were provided by the petitioner. The finished pads were shipped only to its customers, upon instructions supplied by petitioner, and under bills of lading furnished by

it and bearing its name. Under these circumstances, it was petitioner's duty, and entirely within its power, to insure that the cosmetics shipped interstate at its behest and under its name should comply with the Federal Food, Drug, and Cosmetic Act and not constitute a public menace.

II

Petitioner asserts that it acted in good faith and made full disclosure of all pertinent facts to the Government and, therefore, is rendered exempt from criminal penalties by the language of Section 303 (c) (1) of the Act. It is apparent from the specific language of that section, however, that its purpose is to relieve an innocent dealer from the penalties of the Act where he has *received adulterated or misbranded goods in interstate commerce* and delivered them in good faith. The section is clearly designed to protect an innocent dealer who has violated Section 301 (c), which prohibits the *receipt in interstate commerce* of any food, drug, device, or cosmetic that is adulterated or misbranded, and the delivery or proffered delivery thereof for pay or otherwise. But that section is not involved in this case. Petitioner was prosecuted as a shipper, not a receiver, under Section 301 (a) of the Act, which prohibits the introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded. The design of Congress to extend the

exemption created by Section 303 (c) (1) to a dealer who has received a product in interstate commerce so that the interstate shipper can be prosecuted is revealed in Senate Report No. 493, 73d Cong., 2d Sess., accompanying S. 2800, one of the series of bills which led to the passage of the Act. The report states, at page 21:

> The existing law provides for a guaranty whereby a dealer who buys on faith may be protected from liability under the law. This provision has safeguarded innocent dealers and has been extremely useful in fixing responsibility on guilty shippers. It would be continued in effect by paragraph (e). The bill affords in this paragraph further protection to the innocent dealer who distributes goods he has received from interstate sources. If he has failed to secure a guarantee he can escape penalties by furnishing the records of interstate shipment, thus allowing the prosecution to lie solely against the guilty shipper.

It must be borne in mind that both petitioner and Helfrich Laboratories are located in Chicago. In attempting to demonstrate that it received the adulterated cosmetics *in interstate commerce* and, therefore, that it is within the exemption afforded by Section 303 (c) (1), petitioner advances a tortuous theory to the effect that it received the products in interstate commerce at the moment when Helfrich Laboratories delivered them to a carrier for interstate shipment to a consignee des-

771405—47——3

ignated by the defendant. We do not dispute that Helfrich Laboratories was engaged in interstate commerce and did ship the cosmetics interstate. If that were not the situation, no violation of the Act by anyone would have occurred. But the fact that Helrich Laboratories was engaged in interstate commerce, and that the arrangement between it and petitioner may have constituted an interstate transaction, by no means caused petitioner to be one who received the goods involved in interstate commerce.

Section 303 (c) (1) sets up an exemption to the penalties provided by the Act, since it excepts something from the operative effect of the statute and restrains or qualifies the generality of the substantive enactment. It is an established rule of statutory construction that a provision which states an exception from the general policy that the law embodies, or which restricts the general scope of the statute, must be strictly construed and will not be permitted to take any case out of the enacting clause which does not clearly fall within the terms of the exception provision. In *United States* v. *Dotterweich,* 320 U. S. 277, 284, this Court, speaking of the guarantee section of the Act, opposed interpreting "an exception to an important provision safeguarding the public welfare with a liberality which more appropriately belongs to enforcement of the central purpose of the Act."

Petitioner's good faith could not relieve it from its responsibility for having procured the introduction into interstate commerce of deleterious cosmetics. In passing sentence, the district court expressly took into consideration the defendant's lack of scienter and for that reason imposed only a nominal fine of $100 plus costs. Petitioner's good faith served as a mitigating circumstance in the imposition of a penalty, but should not exonerate it from liability occasioned by its carelessness in directing the interstate shipment of adulterated cosmetics injurious to the consuming public.

## CONCLUSION

The decision below is clearly correct, and no real conflict of decisions is involved. We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
*Solicitor General.*
T. VINCENT QUINN,
*Assistant Attorney General.*
ROBERT S. ERDAHL,
VINCENT A. KLEINFELD,
*Attorneys.*

DECEMBER 1947.

U. S. GOVERNMENT PRINTING OFFICE: 1947